# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-228

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, 1-46) is reported at 459 F. 2d 513.

## JURISDICTION

The judgment of the Court of Claims was entered on May 12, 1972 (Pet. App. A, 1-46). The petition for a writ of certiorari was filed on August 9,

1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether the Thailand Business Taxes, the Philippine Tax on Banks, and the City of Buenos Aires Tax on Profit-Making Activities, which taxed petitioner's foreign branch banks on their gross incomes without allowing any deductions for the cost of operating the banks, were income taxes within the meaning of Section 901(b)(1) of the Internal Revenue Code of 1954, so as to entitle petitioner to credits against its United States income taxes rather than merely to deductions from income subject to United States tax.

## STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 901 [as amended by Sec. 3(a), Act of September 14, 1960, P.L. 86-780, 74 Stat. 1010].[1] TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.
>
> (a) *Allowance of Credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the applicable limitation of section 904, be credited with the amounts provided in the applicable paragraphs of subsection (b) * * *

[1] Section 3(a) of the Act of September 14, 1960, amended Section 901(b) of the Internal Revenue Code by adding the word "applicable" in the first sentence. This amendment is effective for taxable years beginning after December 31, 1960.

(b) *Amount allowed.*—Subject to the applicable limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; * * *

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## STATEMENT

Petitioner is a domestic national banking association with principal offices in San Francisco, California. During the years 1959 through 1961 petitioner also conducted a general banking business from branches located in Bangkok, Thailand, and Manila, Republic of the Philippines, and, during 1961 from a branch in Buenos Aires, Argentina. (Pet. App. A, 26-27.)

For the years 1959 through 1961, petitioner paid to Thailand, in addition to a general corporate income tax, two types of Business Tax on (Pet. App. A, 30-31):

(3) gross takings from the business of banking, that is to say

(a) interest, discounts, fees or service charges [Type 1, 2.5 percent of gross takings], and

> (b) profit, before the deduction of any expense, from the exchange, purchase or sale of currency, issuance, purchase or sale of notes or foreign remittances [Type 2, 10.5 percent of gross takings] * * *.

For the same years petitioner paid to the Republic of the Philippines, in addition to a generally imposed income tax on foreign corporations, a 5 percent tax "on the gross receipts derived by all banks doing business in the Philippines from interests, discounts, dividends, commissions, profits from exchange, royalties, rentals of property, real and personal, and all other items treated as gross income" from any source whatsoever (Pet. App. A, 33-34).

For the year 1961, in addition to the generally imposed Argentine Corporation Income Tax petitioner paid The City of Buenos Aires Tax on Profit-Making Activities, two sections of which specifically taxed banks and other financial institutions on the "gross receipts" from "interest, discounts, profits from non-exempt taxable securities and other revenue, resulting from profits and remuneration for services received in the course of the last business year" (Pet. App. A, 35-36).

With respect to none of these three taxes was the petitioner permitted to deduct from gross income the costs or expenses of its banking business or of producing its net income (Pet. App. A, 10). For each of the years 1959 through 1961 petitioner, asserting that the foregoing Thailand and Philippine taxes were income taxes, claimed credit for their

payment against United States income taxes pursuant to Section 901 of the Internal Revenue Code, *supra*. For the year 1961 petitioner also claimed similar credit against its United States income tax for the City of Buenos Aires Tax. The Internal Revenue Service disallowed these credits against United States tax and allowed them only as deductions from gross income (Pet. App. A, 42-43). After petitioner brought suit for refund, the Court of Claims held that these foreign taxes were not creditable because they were not taxes on income within the meaning of Section 901(b)(1). The court noted that the claimed taxes were in addition to the general net income taxes and that they made no allowances for deducting the substantial costs of the banking businesses in earning the taxed proceeds, such as salaries, rent, bad debts and other losses; hence, the court concluded, they were imposed irrespective of the existence of taxable income as that concept is generally defined in the United States Internal Revenue Code (Pet. App. A, 25-26, 46).

## ARGUMENT

1. Although Section 901(b)(1) of the Internal Revenue Code of 1954 authorizes tax credit for "income * * * taxes paid * * * to any foreign country," Congress did not intend to adopt the "shifting standard * * * [of] foreign characterizations" but intended, instead, to attribute to the phrase "income taxes paid" the "well understood meaning to be derived from an examination of the [United States] statutes which

provide for the laying and collection of income taxes." *Biddle* v. *Commissioner*, 302 U.S. 573, 578-579. The United States income tax statutes since their inception have always levied tax on net income or gains rather than on gross receipts, gross revenues or gross income. Accordingly, as the court below held, a construction of Section 901(b)(1) which would allow credit for a foreign tax which is imposed irrespective of the existence of net gains or net income would not be consistent with that "well understood meaning."

Indeed the grant of a tax credit (rather than a deduction from income) for foreign income taxes paid by a United States taxpayer is primarily designed to avoid or minimize the double taxation of foreign income. *American Chicle Co.* v. *United States*, 316 U.S. 450, 452, 453; *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 7. A construction of Section 901 which would allow a credit for a foreign tax irrespective of whether it is imposed on foreign receipts which are likely to result in net income giving rise to United States income tax would be inconsistent with the dominant statutory purpose.

The Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 158(f), liberalized the scope of creditable foreign taxes to include within the term "income tax" a "tax paid in lieu of a tax upon income * * * otherwise generally imposed by any foreign country" (now Internal Revenue Code of 1954, Section 903). The Senate Committee Report sponsoring that amendment indicates that Congress expressly noted the consistent

administrative and judicial construction of the language of Section 901(b)(1) confining a creditable foreign income tax to "a concept of income tax rather closely related to our own * * * imposed upon a basis corresponding approximately to net income" and excluding a tax "measured, for example by gross income." (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 131 (1942-2 Cum. Bull. 504, 602).) In spite of its awareness of this limitation, Congress was willing to broaden the definition of a foreign income tax only to an extent that retained the existing concept of "a tax on income."

2. The construction of Section 901 adopted by the Court of Claims is in accord with that of other circuits and of the Tax Court. *Keasbey & Mattison Co.* v. *Rothensies*, 133 F. 2d 894, 898 (C.A. 3), certiorari denied, 320 U.S. 739; *Commissioner* v. *American Metal Co.*, 221 F. 2d 134, 138-139 (C.A. 2), certiorari denied, 350 U.S. 829; *F. W. Woolworth Co.* v. *Commissioner*, 54 T.C. 1233, 1260-1261.[2] No circuit court decision is to the contrary, and petitioner asserts no conflicting appellate decision.[3]

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[2] These cases are discussed in the Court of Claims opinion (Pet. App. A, 16-17, 19). See also the prior decision of the Court of Claims in *Allstate Insurance Co.* v. *United States*, 419 F. 2d 409.

[3] Petitioner cites *Seatrain Lines, Inc.* v. *Commissioner*, 46 B.T.A. 1076, and *Santa Eulalia Mining Co.* v. *Commissioner*, 2 T.C. 241, which preceded *F. W. Woolworth Co.* v. *Commissioner, supra*, as well as numerous Internal Revenue Service rulings (Pet. 7-8). These are properly distinguished in the opinion below (Pet. App. A, 15-16, 19-20).

3. Petitioner's principal ground for seeking certiorari seems to be that the decision does not "square with the definition of income laid down by this Court for constitutional purposes * * * or with the definition of *gross* income in section 61 of the Internal Revenue Code to mean 'all income from whatever source derived'" (Pet. 9). Petitioner concedes that a foreign tax on the gross receipts of a manufacturing or selling business may not be an income tax because the cost of goods sold must be deducted to arrive at gross income, but argues that a foreign tax on the gross receipts of a banking business which has no cost of goods sold is necessarily a tax on gross income and hence necessarily an income tax (Pet. 5-6). The fallacy in petitioner's argument lies in the unsupported assumption that in enacting Section 901 Congress intended a meaning for foreign income tax as broad as its entire constitutional power to tax income, rather than a meaning more consistent with the limited purpose of the foreign tax credit. Indeed, it is unlikely that Congress would have wanted to make the foreign tax credit depend on so wooden an application of accounting concepts. The cost of salaries, rent, interest on deposits, bad debts and losses may be just as important to the realization of actual profit or gain by a bank as the cost of goods sold is to a merchandising business.

Petitioner also argues (Pet. 6) that Congress has in fact taxed gross income without deductions when it imposed social security tax on the wages of employees and when it imposed a flat 30 percent tax

on periodic income of foreign corporations not engaged in business in the United States. Internal Revenue Code of 1954, Section 881. As the court below explained, however, with respect to these taxes Congress deemed it highly likely that the expenses would not offset the entire income and, consequently, that there would be net gain (Pet. App. A, 22-23). No such assumption can be made with respect to a business; for this reason foreign corporations engaged in business in the United States are taxed approximately in the same manner as domestic corporations, *i.e.*, in a manner which takes full account of deductions matched against gross income. Internal Revenue Code of 1954, Section 882.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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